S. B. CIVIL SECOND APPEAL NO.39/2004
(Smt.Nand Kunwar & Another v. Janki Lal & Others)

Date of Order: :07-02-2007

HON'BLE MR. JUSTICE PRAKASH TATIA

Mr.D.R.Bhandari, for Appellants.
Mr.A.K.Acharya) for Respondents.
Mrs.Pratistha Dave)

Heard learned counsel for the parties.

Plaintiffs filed the suit for possession and injunction, wherein there were ten defendants and out of which, only one defendant, the defendant No.9, alone submitted the written-statement, but he too, did not appear before the trial Court. The trial Court decided the suit of the plaintiff, on the basis of the evidence of the plaintiff alone and the documents which were produced by the plaintiff. The trial Court dismissed the suit of the plaintiff vide judgment and decree dated 29th October, 1998, on the grounds that the plaintiffs failed to plead and prove sufficient material facts for passing decree in favour of the plaintiffs. The plaintiffs preferred regular first appeal before the Court of the Additional District Judge No.2, Udaipur which too, was dismissed vide judgment and decree dated 4th December, 2003. The First Appellate Court was of the view that the suit of the plaintiff was barred under O.2, R.2, CPC, in view of the fact that the plaintiff admitted in his statement before the trial

Court that the earlier suit filed in the year, 1989 for partition is pending and there the plaintiffs did not seek any relief which they are seeking by filing the separate suit. The First Appellate Court also upheld the findings recorded by the trial Court, wherein the trial Court observed that the plaintiffs failed to prove the pedigree so as to prove that they are owner of the property of specific share.

Leanred counsel for the apepllants vehemently submitted that the defendants did not contest the suit and the First Appellate Court committed serious error of law and held that the suit of the plaintiff is barred under O.2, R.2, CPC and further, the First Appellate Court committed error in considering the plea taken by the defendant No.9 in the written statement, despite the fact that the defendant No.9 did not produce any defence by giving evidence.

Learned counsel for the appellants vehemently submitted that the plaintiffs produced as many as 19 documents and those documents were not rebutted by the defendant. It is also submitted that earlier, the suit for injunction was filed and it was dismissed because of the reason that the defendants forcibly took possession of the property and, therefore, the plaintiffs were entitled to file the suit for possession and, therefore, the

suit of the plaintiff was maintainable. It is also submitted that the partition suit of the year, 1989, wherein the preliminary decree was passed by the trial Court and the appeal against that is pending in the High Court, is between the descendants of plaintiffs appellant's ancestors and is not in between the plaintiffs, descendants of Ganga Prasad and defendants, therefore, the filing of the partition suit and passing of the preliminary decree in that suit and pendency of the appeal was totally irrelevant for the purpose of deciding the present suit. Leanred counsel for the appellants relied upon the judgments of the Supreme Court, wherein it has been laid down that the plea on the basis of O.2, R.2, CPC, can be taken in written-statement and, for that purpose, necessary ingredients are required to be proved and that is the burden of the defendants taking the plea under O.2, R.2, CPC. Learned counsel for the appellants vehemently submitted that the courts-below committed serious error of law by not considering the documentary evidence produced by the plaintiff, despite the fact that those documents have not been rebutted and further more, the defendants did not choose to cross-examine the plaintiffs on the documents produced by the plaintiffs. It is also submitted that there is no plea of any of the defendants, except defendant No.9 in rebuttal to the facts stated by the plaintiffs and defendant No.9 did not

appear after filing the written-statement, therefore, in fact, the Court should have believed the statement of the plaintiff and should have considered the documentary evidence. It is also submitted that the documents which were old more than 30 years, for that, the Court could have drawn presumption of the due execution and that has not been taken by the courts below and thereby the courts had committed error of law.

I considered the submissions of the learned counsel for the appellants and perused the facts and the reasons given by the two courts-below while dismissing the suit and appeal of the plaintiffs. Even if all defences taken by the defendant No.9 in his written-statement are ignored, even then the plea on the basis of O.2, R.2, CPC, is not available to the defendants, even then it apears that the two courts below have not dismissed the suit of the plaintiffs, merely on the ground of bar of O.2, R.2, CPC, or on the ground that the defendant No.9 took some pleas in the defence. The two courts – below considered the statement of the plaintiff, wherein the plaintiff himself without disclosing the complete facts in the plaint, stated in his evidence that the partition suit is pending for the same property and in the statement in the examination-in-chief, the plaintiff himself did not disclose that the partition suit was filed by one of the descendants of only Gangaprasad and that suit is not against

the defendants and the plaintiff is now seeking to insert in the statement of plaintiff by arguments only and the learned counsel for the appellants submits that the partition suit was filed by one of the descendants of Gangaprasad against the plaintiffs. There is no evidence to this effect on record. The evidence which on record is the statement of one of the plaintiffs that partition suit with respect to the property in question situated on plot No.33, the plot in dispute, was filed and therein preliminary decree was passed.

So far as other grounds are concerned, it is worthwhile to mention here that according to the plaintiffs' own contention, one of the portions of the property in dispute was let out by the plaintiff to one Bhagwati Bai. The defendant No.1 started harassing the said plaintiff's tenant Bhagwati Bai, therefore, Bhagwati Bai filed suit for injunction, wherein injunction order was passed, but because of harassment, Bhagwati Bai left that rented premises of the plaintiff. The plaintiffs' case is that because of that reason, the plaintiffs filed the suit for possession. The plaintiffs did not produce the said Bhagwati Bai in the witness box,nor placed on record sufficient material or evidence to prove that Bhagwati Bai either handed over possession to the defendants or defendants forcibly took possession from Bhagwati Bai. Be it as it may be, there is no other independent evidence

which was necessary because of the reason that there were earlier litigations with respect to the property in dispute.

So far as the documentary evidence is concerned, it is worthwhile to mention here that the plaintiffs only tendered in evidence the documents and did not choose to prove any of the documents. Be it as it may be, the documents which were old more than 30 years, for that, the plaintiffs could have requested for drawing presumption of due execution of the documents, but no such prayer was made before the trial Court or before the First Appellate Court or in the second appeal. The presumption could have been taken by the courts on their own or at the request of the party relying upon the documents, but such request in the facts and circumstances made in the second appeal that too in argument, cannot be accepted.

In view of the above reasons, I do not find that any substantial question of law is involved in this appeal. Hence, the appeal is dismissed.

(PRAKASH TATIA), J.

Scd.